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February 11, 2010

General Counsel
Federal Election Commission
999 E St., N.W.
Washington, DC 20463

Re: MUR 6247, Complaint of Vickers L. Cunningham, Sr.

Dear Sir or Madam:

This firm represents Clarity Digital Group, LLC, which owns and operates the web site, Examiner.com. We write in response to your letter dated January 26, 2010, addressed to Richard M. Jones, enclosing a Complaint filed by Vickers L. Cunningham, Sr. with the Federal Election Commission (the "Commission"). Clarity Digital Group, LLC, d/b/a Examiner.com ("Examiner.com"), is a wholly owned subsidiary of Clarity Media Group, LLC ("Clarity"). This letter is followed by the sworn verification of the facts recited by an authorized representative of Clarity.

Based upon the information Mr. Cunningham provided in his Complaint, and the additional information furnished by this letter, it does not appear that any action against Examiner.com by the Commission is authorized or warranted.

Mr. Cunningham bases his Complaint upon a commentary submitted by Mr. Dave Smith ("Smith"), an independent third party contributor to the Examiner.com "edition" dedicated to Dallas, Texas, in which Smith announced his candidacy for the United States Congressional seat for the 32nd District of Texas, and also announced a forthcoming campaign "kick-off" and "fundraiser" event.

In this letter, we will provide a more complete factual background, including a description of the business model of Examiner.com, the arrangements between Examiner.com and Smith, and the circumstances surrounding the posting of the commentary in issue. We will then provide the Commission with the reasons why no action is authorized or warranted in this case.

I. FACTUAL BACKGROUND

Examiner.com is a website that provides local information regarding 240 different cities in the United States and Canada almost exclusively through user-generated content. For each community served by Examiner.com there is a separate "edition" featuring local information, insider perspectives, helpful resources, and a view into a variety of events and activities for the particular community, all provided by independent third party contributors referred to as "Examiners."

From each local community served, Examiner.com recruits "Examiners" to submit, on a regular basis, articles on a chosen topic in which the individual Examiner has some particular knowledge or expertise. The information provided will often include details on local events and opportunities for people to become involved in local activities. Each person who applies to become an Examiner must demonstrate basic facility with the English language and knowledge of a particular aspect of community life. At present, the number of Examiners recruited by Examiner.com exceeds 30,000.

Examiners are paid a competitive rate based on standard Internet variables including page views, unique visitors, session length, and advertising performance. Under the contract between Examiner.com and each Examiner, the Examiner may be terminated or suspended at any time for any reason (or without cause). Each Examiner agrees to abide by the "Examiners Independent Contractor Agreement and License" and Examiner.com's "Terms of Use," both of which are enclosed with this letter (collectively the "**Examiner Terms**"). Examiner.com retains the right to remove postings in the event they do not comply with the Examiner Terms, or in the event Examiner.com finds a posting unacceptable for any other reason.

The Examiner.com website is accessible by the public free of charge. Any visitor is permitted the opportunity to submit comments to any item posted on Examiner.com, provided they too agree to abide by Examiner.com's Terms of Use.

As is typical of citizen journalism online publishing organizations, Examiner.com does not review or edit postings submitted by Examiners or others; rather, they are automatically posted upon receipt from the source. Examiner.com does not pay a pre-determined fee and incurs no content-related costs in connection with any individual posting. This business model is consistent with that envisioned by this Commission in its Internet Rulemaking and by Congress in enacting Section 230 of the Communications Decency Act of 1996, as will be discussed further below.

Smith became an Examiner based upon his knowledge, background, and experience in Republican politics in Dallas, Texas and vicinity. As acknowledged by Mr. Cunningham's

Complaint, Smith, like other Examiners, is an independent contractor and not an employee of Clarity or Examiner.com. Mr. Cunningham has submitted exemplars of Mr. Smith's postings as an Examiner in the Dallas market as Ex. 1 to the Complaint.

On November 3, 2009, Smith posted to Examiner.com an item of commentary that announced his candidacy for the U.S. Congress, 32nd District of Texas, and also announced a fundraiser and campaign kick-off event to take place November 9, 2009. Mr. Cunningham has submitted a copy of this posting as Ex. 2 to the Complaint. This posting was created without any participation by or instruction from Examiner.com as to the subject or content of the article. Examiner.com was not aware of the existence of (nor the specific content contained within) this posting until it received Mr. Cunningham's Complaint. Upon receipt of the Complaint, Examiner.com removed the November 3rd posting from its website, and has suspended David Smith as an Examiner, pending resolution of the issues raised by the Complaint.

Under the contract between Examiner.com and Smith, the latter became entitled to payment of only $8.06 as a result of the November 3rd posting (based on the formula described above, including variables such as page views, unique visitors, session length, and advertising performance).

II. EXAMINER.COM'S LEGAL POSITION

A. THE ACTIVITY WHICH IS THE SUBJECT OF THE COMPLAINT IS EXEMPT FROM ANY ENFORCEMENT ACTION

Mr. Cunningham's Complaint alleges the cost of distributing Smith's post on the Internet and, in particular, the amount Examiner.com paid to Mr. Smith for the posting, are contributions and expenditures prohibited by the Federal Election Campaign Act of 1971, as amended (the "Act"). 2 U.S.C. 431, *et seq.*

The Act prohibits "any corporation whatever" from making any contribution or expenditure in connection with a federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" for the purpose of influencing a federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 C.F.R. §§ 100.52(a) and 100.111(a).

If the Commission will scrutinize the economics of the transaction between Smith and Examiner.com, we believe it will become apparent that there has been no transfer of value that could result in an "expenditure" or "contribution." Examiner.com incurs no costs as a result of any posting by Smith, and incurs only the costs that become due as a result of value received in the form of page views (on which Examiner.com serves third party advertisements). These

payments are for value received and not an "expenditure" on behalf of, or a "contribution" to the Smith campaign.

Even if the term "expenditure" or "contribution" were otherwise applicable, the Act provides that "The term 'expenditure' does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. 431(9)(B)(i). This exclusion is known as the "press exemption" or "media exemption." The Commission's regulations further provide that neither a "contribution" nor "expenditure" results from "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate." C.F.R. §§ 100.73, 100.132.

The legislative history of the media exemption indicates that Congress did not intend to "limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

The Commission has not limited the press exemption to traditional news outlets, but rather has applied it to "news stories, commentaries, and editorials *no matter in what medium they are published*," and specifically has extended the exemption to Internet web sites and entities that distribute their content exclusively on the Internet. *Explanation and Justification for the Regulations on Internet Communications ("Internet Rulemaking")*, 71 Fed. Reg. 18589, 18608-09 (Apr. 12, 2006) (emphasis added); *see also* Advisory Opinions 2005-16 (Fired Up!) and 2000-13 (iNEXTV). The Commission has also recognized "the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach." *Internet Rulemaking*, 71 Fed. Reg. at 18589.

Thus, under the Act and the Commission's regulations, unless a press entity's facilities are owned or controlled by a political party, political committee, or candidate, the costs of distributing any news story, commentary, or editorial distributed through the qualifying media are neither contributions nor expenditures.

To determine whether the press exemption applies, the Commission first asks whether the entity engaging in the activity is a press or media entity. *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission applies

the two-part analysis prescribed by *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

(A) That the entity is not owned or controlled by a political party, political committee, or candidate; and

(B) That the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its "legitimate press function").

See also FEC v. Phillips Publ'g, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

In its functions described above, Examiner.com, and each of its local editions, qualifies as a media entity. *See* Factual and Legal Analysis, MUR 5928 (Kos Media, LLC, Sept. 4, 2007); Advisory Opinion 2005-16 ("The Inside Track"), Dec. 9, 2005. The media exemption then proceeds to the two-part inquiry described above. In reference to the first prong of that inquiry, Examiner.com is not controlled by a political party, a political committee, or a candidate. The Complaint acknowledges that Smith is not an employee of Examiner.com. For that reason, the Commission's ruling in the Advisory Opinion 2005-07 (Mayberry), August 19, 2005, is inapposite.

Thus, the media exemption inquiry devolves upon whether Examiner.com was acting as a press entity in conducting the activity at issue, *i.e.*, in its "legitimate press function." There is little doubt that carrying press releases about candidate announcements and announcements concerning fundraising events are normal and legitimate press functions. Indeed, courts applying the media exemption have agreed that it is broad enough to cover materials circulated by the media for promotional purposes. *Reader's Digest*, 509 F. Supp. at 1215; *Phillips Publ'g*, 517 F. Supp. at 1313. The posting in issue in this case was handled and disseminated by Examiner.com in the exact same manner as it receives and distributes other postings by David Smith, or indeed, any other contributing "Examiner." *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 250-51 (1986). The Commission has recognized that the media exemption applies without regard to political "bias" in any form, including comments to support or oppose a candidate for office. *Internet Rulemaking*, 71 Fed. Reg. at 18609.

The Commission has found the exemption applicable to activity that includes on-air interviews of candidates. Advisory Opinion 2004-07 (MTV); Advisory Opinion 2007-20 (XM Satellite Radio, Inc.); *see Internet Rulemaking*, 71 Fed. Reg. at 18610 n.57 ("[T]he press exemption is not limited to commentaries made by the broadcaster.") (citing Advisory Opinion 1982-44 (Democratic National Committee and Republican National Committee). The Commission has also held the exemption covers "calls for action," and fundraising

announcements, provided that the media entity does not become involved in contribution collection on behalf of a candidate. Advisory Opinion 2008-14 (Melothé, Inc.) Nov. 13, 2008; *see also Internet Rulemaking*, 71 Fed. Reg. 18609 ("[P]ress entities do not forfeit the press exemption if they solicit contributions for candidates.").

Mr. Cunningham's Complaint also asserts that the Act was violated by failure to include required disclosures and disclaimers in the message that Smith posted. However, the Act does not impose any obligation on online media receiving posts of campaign promotional communications to investigate whether a particular message is in compliance with the Act. Indeed, the only obligation that the Act appears to impose on an independent internet medium is the requirement that it charge similar rates for advertising in connection with a candidate's campaign that they charge for such advertising space used for other purposes. *See* 2 U.S.C. § 441d(b). There is no allegation that Examiner.com violated this provision in any manner. The Commission has made clear that the political speaker on the Internet, "not the . . . Web site owner – would be subject to the applicable restrictions on 'public communications.'" *Internet Rulemaking*, 71 Fed. Reg. at 18595. We also note that Examiner.com does charge for advertising, but no charge was made for the article posted by Smith.

B. EXAMINER.COM IS IMMUNE FROM CIVIL LIABILITY FOR THE MATTERS RAISED IN THE COMPLAINT PURSUANT TO § 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996

The Communications Decency Act of 1996 ("CDA") provides in 47 U.S.C. § 230(c)(1) that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This provision results in immunity from any form of liability, with inapplicable exemptions, for any web host who does not act as an "information content provider" with respect to the posting. An "information content provider" is one who is "responsible, in whole or in part, for the creation or development" of the content in question. 47 U.S.C. § 230(f)(3). The resulting immunity bars imposition of any form of civil liability, including liability for civil penalties under federal remedial legislation. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).[1]

[1] CDA § 230 exempts from the immunity provided by that section liability under any "federal criminal statute." 47 U.S.C. § 230(e)(1). However, the Commission's jurisdiction is limited to civil enforcement, and in any event, the criminal provisions of that Act are not triggered by the *de minimus* amount of money involved in the Smith posting of November 3, 2009.

Examiner.com, with its network of Examiner contributors, and bulletin board for reader commentary, is clearly an interactive service provider. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d at 1162; *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-51 (D.D.C. 1998). Examiner.com had no part in the creation or development of content posted on its website. Merely inviting a contributor to post material regarding a general subject matter, such as local Republican politics, is not to participate in the creation or development of the information submitted by that contributor. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d at 1173.

The liability sought to be imposed here derives from the distribution of content posted on the facility of an interactive computer service provider. The cost of distributing Smith's announcement (which, as noted above, is virtually non-existent), as well as the amount paid to Smith (based on the formula described above), could achieve status as prohibited contributions or expenditures only as a result of the content of the message. That means that for liability to attach, it would be necessary to treat Examiner.com as a "publisher" as contemplated by § 230. Section 230 has been given very broad application, and courts have rejected attempts to argue that § 230 immunity is inapplicable because the challenged regulation focuses only incidentally on content. *See Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008) (§ 230 bars claim for negligence in failing to take reasonable measures to prevent minors using website from being exposed to sexual predators); *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007) (§ 230 immunity bars claims for breach of contract and fraud arising from failure to keep minors from accessing website), *aff'd*, 551 F.3d 412 (6th Cir. 2008); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006) (rejecting under § 230 claims arising out of website's failure to adhere to promise that it verified business listings prior to publication); *Noah v. AOL/Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003) (rejecting plaintiff's claim, as barred by § 230, seeking to hold AOL liable under Title II by treating AOL "as the owner of a place of public accommodation, not a 'publisher'").

III. THE COMMISSION SHOULD NOT TAKE ACTION ON THE COMPLAINT, BECAUSE THE TRANSACTION IN QUESTION IS *DE MINIMUS*

The value of the transaction placed in issue by the Complaint is less than $10.00. "The amount claimed to have been spent in violation of law is always a factor in the Commission's enforcement decisions . . . ." *Internet Rulemaking*, 71 Fed. Reg. 18595. In addition, the Internet activity that is the subject of the Complaint mirrors the characteristics of the Internet that have moved the Commission to declare that "the internet [is] a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach." *Id.* at 18589. Accordingly, the Complaint in this case does not warrant action by the Commission.

IV. CONCLUSION

Because the Internet transaction that is the subject of the Complaint is exempt from the Commission's jurisdiction under the media exemption, and immune from such regulation under § 230 of the Communications Decency Act of 1996, and of a *de minimus* character, the Commission should take no action on the Complaint.

Please do not hesitate to contact me if you have any questions regarding the foregoing or seek further information in connection with the matter.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By _____
Thomas B. Kelley

TBK/cdh
Enclosure
cc: Deborah Shinbein, Esq.

VERIFICATION

Deborah Shinbein, Esq., first being duly sworn, deposes and states that she is Vice President for Business Development and General Counsel to Clarity Digital Group, LLC, and that the facts recited in the foregoing letter by Thomas B. Kelley of Levine Sullivan Koch & Schulz addressed to General Counsel, Federal Election Commission, are true and correct according to her best knowledge, information, and belief.

Deborah Shinbein
DEBORAH SHINBEIN

STATE OF COLORADO
City and)ss.
County of Denver)

SUBSCRIBED AND SWORN TO before me this 11th day of February, 2010.

Mary Cecile Oertle
Notary Public

My commission expires: 12/2/2013

[seal]